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Nos. 95-1455 and 95-1508

In the Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

GEORGE PRICE, ET AL., APPELLANTS

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL APPELLANT

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1. As we explained in our opening brief, the district court improperly refused to consider both the racially dilutive impact of the redistricting plan that the Bossier Parish School Board (Board) adopted and the Board's history of discrimination—two important types of circumstantial evidence bearing on the Board's purpose. See *Rogers* v. *Lodge*, 458 U.S. 613, 618, 623-626 (1982). With respect to evidence of a historical pattern of discrimination, appellee contends (Bd. Br. 29) that this Court in

Shaw v. *Hunt*, 116 S. Ct. 1894 (1996) (*Shaw II*), and *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), "viewed as irrelevant" a covered jurisdiction's "well-documented history of racial discrimination." That contention is plainly incorrect. In each of those cases, the Court concluded that the particular record before the three-judge district court did not support an inference of discriminatory purpose. See *Miller*, 115 S. Ct. at 2492; *Shaw II*, 116 S. Ct. at 1904. It did *not* reject the well-established line of precedent holding that evidence of past racial discrimination is directly relevant to a governmental actor's motivation in adopting a challenged policy. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) (factors relevant to the purpose inquiry include the "historical background of the decision"—"particularly if it reveals a series of official actions taken for invidious purposes"); *Rogers*, 458 U.S. at 624-625 ("Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination."); *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983) (same); *City of Pleasant Grove* v. *United States*, 568 F. Supp. 1455, 1458 (D.D.C. 1983) (same).

With respect to the dilutive effect of the challenged plan, appellee first contends (Bd. Br. 32-33) that "the district court quite clearly, thoroughly and directly considered the adopted redistricting plan's effect on minority voters," and later suggests (*id.* at 33, 35) that the district court simply presumed that the Police Jury plan adopted by the Board had a dilutive impact. Both of those contentions are incorrect. As to the former, appellees cannot point to *any* discussion of the plan's dilutive impact in the majority opinion below. As to the latter, the district court nowhere presumed that appellee's plan had a dilutive effect on minority voters.

Appellee states (Bd. Br. 33, 34, 35, 36) that "it is assumed, due to the racial polarization and prior discrimination that renders the jurisdiction subject to Section 5 preclearance, that such racially-charged electoral conditions exist and white majority districts will thus have a foreseeable impact." The district court, however, expressly declined to consider such "section 2 evidence" (J.S. App. 23a, 24a), [1] and thus eliminated from its analysis an important category of evidence.[2]

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[1] Contrary to appellee's suggestion, moreover, racially-polarized voting patterns are not among the factors that trigger Section 5 coverage. See 42 U.S.C. 1973b(b).

[2] Appellee places substantial reliance (Bd. Br. 6, 8, 27, 28, 31) on the district court's statement that it did not consider "evidence relevant *only* to the section 2 inquiry." J.S. App. 9a n.6 (emphasis added). The district court, however, clearly refused to address any evidence regarding the dilutive impact of the Board's redistricting plan—a category of evidence that this Court has held to be relevant to the issue of discriminatory purpose, as well as to Section 2. See *Rogers* v. *Lodge*, *supra*.

Appellee also contends (Bd. Br. 30-31, 32 n.25) that the United States had "drawn a clear distinction between 'section 2 evidence' [such as evidence of racial bloc voting] and evidence 'independently relevant' to Section 5 purposes [such as evidence of historical discrimination]." Bd. Br. 32 n.25. We drew no such distinction. The heading of the relevant section of our post-trial brief made clear our position that "[t]he Section 2 evidence presented in this case is independently relevant to material issues outside the Section 2 inquiry." Gov't Post-Trial Brief at 36. In any event, the district court clearly did not limit its exclusion of "section 2 evidence" to evidence of racial bloc voting, nor would that limited exclusion have been warranted given the relevance of bloc voting to the question of foreseeable discriminatory effects. See, *e.g.*, *City of Port Arthur* v. *United States*, 517 F. Supp. 987, 1022 (D.D.C. 1981) (three-judge court) ("Knowing that City politics were seriously polarized by race, the officials responsible for developing the [challenged electoral] plan must have realized the improbability of the black population electing more than one candidate of its choice."), aff'd, 459 U.S. 159 (1982).

Appellee suggests (Bd. Br. 33) that a court is under no obligation to consider evidence that a redistricting plan has a racially discriminatory impact if the court "cut[s] directly to the dispositive question" of what actually motivated the decisionmaker. In appellee's view, evidence of vote dilution "tells us *why* a black majority district is *needed* to elect black candidates, but it says nothing about *why* a black majority district was *not created*." *Id.* at 34-35. This Court has squarely rejected that proposition.

Government officials rarely provide direct evidence of their discriminatory intentions. Because the Voting Rights Act is "aimed at the subtle[] as well as the obvious" discriminatory voting practices, *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565 (1969), courts must conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. This Court has repeatedly held that evidence of an action's discriminatory impact is an important category of circumstantial evidence bearing on intent. See, *e.g.*, *Rogers*, 458 U.S. at 623-624; *Washington* v. *Davis*, 426 U.S. 229, 242 (1976); *City of Mobile* v. *Bolden*, 446 U.S. 55, 70 (1980); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 & n.18 (1982); *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 464-465 (1979).

"Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." *Washington* v. *Davis*, 426 U.S. at 253 (Stevens, J., concurring). Accordingly, a governmental action with foreseeably harmful effects on a discrete group supports an inference that those effects were intended. See *Personnel Admin.* v. *Feeney*, 442 U.S. 256, 279 n.25 (1979) (where adverse consequences of a law on an identifiable group are inevitable, "a strong inference that the adverse effects were desired can reasonably be drawn").

In adjudicating purposeful dilution cases, the courts have thus looked to whether a districting plan's discriminatory effect was understood by, or foreseeable to, the governmental body that enacted it. See, *e.g.*, *Garza* v. *County of Los Angeles*, 918 F.2d 763, 768 n.1 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *Rybicki* v. *State Bd. of Elections*, 574 F. Supp. 1082, 1108-1109 (N.D. Ill. 1982) (three-judge court). The mere existence of a history of discrimination and a present discriminatory effect does not ordinarily compel a finding of discriminatory purpose. But see *Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action."); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 342 n.23 (1977) (observing, in a Title VII case, that "the company's inability to rebut the inference of discrimination came not from a misuse of statistics, but from the inexorable zero") (internal quotation marks omitted); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). Such evidence, however, is highly relevant to the intent inquiry. Here, the district court erred in refusing to consider how the Board's awareness of the dilutive impact of the Police Jury plan bore on the question of intent.

Contrary to appellee's contention (Bd. Br. 28-30), this Court's decisions in *Shaw II* and *Miller* are consistent with that principle. In those cases, the Court deemed "insupportable" the Attorney General's decision to interpose Section 5 objections to particular congressional redistricting plans. *Shaw II*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492. In neither case did the Court refuse to consider the effect of the redistricting plan at issue on minority voters. To the contrary, in each case the Court emphasized that the plan initially adopted by the legisla-

ture was ameliorative—that is, that the plan would have improved the opportunity for minority voters to elect their chosen candidates—and that there was no other "evidence of an intent to discriminate against minority voters." *Miller*, 115 S. Ct. at 2483; see *Shaw II*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492-2493.[3] The Court thus concluded that the only possible basis for the Attorney General's objections must have been the States' simple failure to draw as many majority-minority districts as possible—a basis the Court found insufficient to warrant a finding of discriminatory purpose. See *Shaw II*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492. Here, by contrast, the plan adopted by the Board perpetuated the dilutive impact of the prior plan—under which no black candidate had ever been elected. See J.S. App. 115a-116a (¶¶ 153-157).[4] Selection of the Police Jury plan was intended to ensure that the existing dilution of minority voting strength would continue.

Appellee also contends (Bd. Br. 3; emphasis omitted) that "[t]here is no competent evidence of racial bloc voting in any local Bossier Parish elections." That is untrue. A

[3] Indeed, in concluding that North Carolina's rejection of an alternative plan did not reflect a discriminatory purpose, the Court specifically relied on evidence that the State believed the alternative plan to be *less* protective of minority voting strength than the ameliorative plan that it adopted. See *Shaw II*, 116 S. Ct. at 1904 (quoting statement in State's Section 5 submission that the second majority-minority district in the alternative plan "'did not have an effective minority voting majority' because it 'depended on the cohesion of black and Native American voters, and no such pattern was evident' and 'this plan dramatically decreased black influence' in four other districts").

[4] The Board's plan reduced the African-American voting-age population (VAP) in each of the two districts with the largest black VAP concentrations—from 42.1% to 40.9% in District Four and from 36.9% to 36.1% in District Seven. J.A. 44, 47.

regression analysis of the only interracial parish-wide race for local office in recent years (the 1988 primary election for the 26th Judicial District Court) revealed a high degree of racial polarization: the analysis estimated that 79.2% of black voters supported the unsuccessful African-American candidate, while only 28.9% of white voters did so. J.S. App. 122a-123a (¶¶ 183-184); J.A. 113-115. It is appropriate to consider the results in such "exogenous" parish-wide elections where, as here, many districts contain too few precincts to perform a reliable ecological regression analysis for elections that are held in individual districts. See generally J.A. 114-121.[5] The parties stipulated, moreover, that "[o]f the 14 elections since 1980 in which black candidates have run against white candidates for a single-member district or for mayor, only two candidates have won." J.S. App. 127a (¶ 196).[6]

[5] See *Westwego Citizens for Better Gov't* v. *City of Westwego*, 872 F.2d 1201, 1208-1210 (5th Cir. 1989); *Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) (concluding that *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), "suggests flexibility in the face of sparse data"), cert. denied, 492 U.S. 905 (1989).

[6] Those two candidates (Jerome Darby in Police Jury District 10 and Jeff Darby in Bossier City Council District 2) were elected under unique circumstances that do not detract from the broader pattern of racially-polarized voting in Bossier Parish. See *Gingles*, 478 U.S. at 57. Those candidates were elected in districts that included substantial areas surrounding Barksdale Air Force Base—an atypical factor that reduced the racial polarization and increased comparative African-American voter turnout in those districts. J.S. App. 2a n.1, 117a-118a (¶¶ 160-164), 120a (¶ 172), 127a (¶ 196). When that unique factor no longer obtained following the post-1990 census redistricting, Jeff Darby lost his seat to a white challenger. *Id.* at 120a (¶ 173). (Jerome Darby was not opposed for reelection. *Id.* at 118a-119a (¶ 165)). Nor do the results of the 1996 school board elections detract from the conclusion that significant polarization exists. Cf. Bd. Br. 5 & n.4. This Court

The record thus fully supports Judge Kessler's conclusion that the Board's adoption of the Police Jury plan "effectively excludes minority voters from the political process." J.S. App. 41a. By refusing to consider this significant, racially dilutive impact, the district court did not simply "cut directly to the dispositive question" (Bd. Br. 33) of the Board's intent. Rather, it excluded important evidence from its inquiry into that question. In light of appellee's burden of persuasion, see *Georgia* v. *United States*, 411 U.S. 526, 538 (1973), and the other strong indicia of discriminatory purpose in this case, that determination may well have made the difference in the district court's decision. The judgment therefore cannot stand. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982).

2. Appellee stresses purported inadequacies of the NAACP plan proposed to the Board by appellant-intervenor Price (Bd. Br. 2, 40-41, 47-48), and contends that "[t]he Board was offered a choice between two alternative redistricting plans." *Id.* at 40. The proper inquiry in this case, however, is whether the electoral plan that the Board *did* adopt—the Police Jury plan—was selected because of its foreseeable adverse effects on African-American voters. The merit of the NAACP plan is not presented in this case, nor was that plan the only other alternative available to the Board when it made the decision at issue here.

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denied appellee's motion to supplement the record to include these election results. 116 S. Ct. 1540 (1996). Without being tested and placed in context, they can have little or no probative significance. They have not, for example, been subjected to the kind of expert analysis of racial polarization and turnout that the parties conducted regarding previous elections, see J.S. App. 122a-127a, and there has been no exploration of special circumstances that might bear on their probative value—including, for example, whether the pending litigation itself had any impact on the elections. See *Gingles*, 478 U.S. at 75-76 & n.37.

The Board had initially refused to adopt the Police Jury's 1991 plan, even though that plan had received Section 5 preclearance. Instead, it proceeded without haste to develop its own independent plan. That action was understandable; it is undisputed that the Police Jury and the School Board generally have different redistricting interests, and that ample time remained for the Board to draw its own plan before its first post-census election in 1994. J.S. App. 4a; *id.* at 72a (¶ 24). But as soon as the local NAACP presented its proposal, the Board abruptly changed course. *Id.* at 96a-101a. At the very next Board meeting after the NAACP presented its proposal (two years before the next election), the Board passed a motion of intent to adopt the Police Jury plan, which contains no majority-black districts. That plan made no attempt to accommodate School Board members' "typical[] concern[] with having a public school or schools in each district." *Id.* at 73a (¶ 24), 112a (¶ 141).[7] It also "wreaked havoc with the incumbencies of four of the School Board members." *Id.* at 28a. The Board's precipitate decision to adopt a plan that disserved its usual redistricting goals supports a strong inference of discriminatory purpose. See *Arlington Heights*, 429 U.S. at 267 & n.17.

Appellee is thus incorrect in stating (Bd. Br. 40) that "[t]he Board was offered a choice between two alternative redistricting plans." Given the significant length of time before the next election, one would expect the Board to have continued the process on which it had initially embarked and explored other alternatives to the Police Jury plan. See *Arlington Heights*, 429 U.S. at 267 ("De-

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[7] Appellee derides this concern as "appellants[']] newly-discovered 'a school building in every district' rule." Bd. Br. 49 n.34. But it was the School Board itself that stipulated to the consideration's importance. See J.S. App. 73a (¶ 24).

partures from the normal procedural sequence also might afford evidence that improper purposes are playing a role."). Those alternatives might have involved different configurations for drawing two majority-black districts in Bossier Parish. They also might have included plans drawing a single majority-black district; the parties have stipulated that it was "obvious" that a reasonably compact black-majority district could be drawn within Bossier City. J.S. App. 76a (¶ 36).[8] The Board was not required to adopt the NAACP plan or any particular alternative; nor does the mere "failure to maximize" majority-minority districts (Bd. Br. 42) establish a discriminatory purpose. Under the facts of this case, however, the Board's decision immediately to enact the Police Jury plan when presented with the NAACP proposal, and its sudden abandonment of its legitimate search for alternative plans, strongly suggest that the Board adopted the Police Jury plan for an impermissible reason. See *Arlington Heights*, 429 U.S. at 267.

The context of the Board's decision also makes clear the pretextual nature of the Board's assertion that its action was required by a state law against splitting precincts. As we explained in our opening brief (Br. 9 n.6), precincts are purely administrative units designed for the management of elections. The district court found that from the start of the redistricting process the Board "likely anticipated the necessity of splitting some precincts." J.S. App.

[8] Appellee urges the Court to disregard this stipulation (Bd. Br. 48 n.33), arguing that it is inconsistent with the record developed at trial. Trial in this case was limited, at the district court's suggestion, to two days only, and the live testimony consisted solely of cross-examination—the parties were restricted to submitting direct testimony in written, narrative form. Given these constraints on proof, the United States should not be penalized for failing to present additional evidence of facts to which appellee had already stipulated.

29a. The Board's own redistricting consultant provided the Board members with precinct maps and instructed them that they "would have to work with the Police Jury to alter the precinct lines." *Id.* at 95a (¶ 89). Had the Board done so, its plan would have constituted neither a "violation[]" nor an "eva[sion]" (Bd. Br. 44) of state law, for it is undisputed that the Police Jury had the power to redraw precincts. J.S. App. 6a-7a, 72a. Although the Police Jury had rejected the Board's initial overture for joint *redistricting* (Bd. Br. 45)—an action readily explainable by the two bodies' divergent districting interests—appellee has presented no evidence that the Board would have refused to cooperate in altering *precinct* lines to accommodate whatever districts the Board drew.[9] Nor has appellee explained why the Board did not even approach the Police Jury to determine whether it would cooperate. The dictates of state law simply do not explain the Board's abrupt decision to adopt the Police Jury plan.

Nor can the Board's use of the Police Jury plan be explained by concerns regarding the cost of additional precincts. Contrary to appellee's contention (Bd. Br. 44-45), adopting a plan with two majority-black districts would not have required a significant increase in the number of precincts. Even if, as appellee now argues, adoption of such a plan would cut existing precinct lines in 65 places,[10] many areas cut out of those precincts could be

[9] Appellee suggests (Bd. Br. 45) that the Police Jury had no incentive to cooperate *after* the Attorney General's objection to the Board's plan, because doing so would have constituted an admission of the Police Jury's own liability. But the Police Jury's cooperation with the Board *at the time the Board redistricted* would have carried no such inference of admission.

[10] For this figure, appellee relies on Plaintiff's Exhibit 11, a table that was not the subject of testimony or other explanation below. On its face, however, the exhibit does not suggest that 65 new precincts

consolidated with each other or with existing precincts — an option that is permissible under Louisiana law. Def.-Int. Exh. G at 14. Throughout the redistricting process, the Police Jury anticipated consolidating precincts "as soon as practicable." J.S. App. 86a (¶ 61). Had the Board explored the possibility of precinct consolidation, it could have drawn a plan containing two majority-black districts with as few as 46 total precincts—3 precincts more than the 1990 total, and 10 precincts *fewer* than the Police Jury used in its 1991 redistricting plan. Def.-Int. Exh. G at 14-15. Such consolidations would have addressed any significant concern with increased costs.[11] The Board's failure even to examine the prospect of consolidation, and the Police Jury's own adoption of a redistricting plan that required the creation of 13 additional precincts, cast considerable doubt on appellee's asserted concern with electoral costs.

For similar reasons, appellee's suggestion (Bd. Br. 47-48) that the NAACP plan split three towns does not

would need to be created under the NAACP plan. The exhibit identifies 65 precinct "cuts," but 13 of those "cuts" contain no population, and many others contain very small population totals. The "cuts" therefore could readily have been remedied by consolidation with other precincts.

[11] Appellee does not mention the availability of *consolidating* precincts—a procedure that reduces the number of precincts by joining them together for all purposes and thus saves the election costs that additional precincts would entail. See J.A. 171. Appellee instead refers to the possibility of allowing *separate* precincts to share polling places (Bd. Br. 45 n.31)—a distinct process that may reduce some election costs but does not reduce the number of precincts. Compare J.S. App. 85a-86a (¶ 61) (noting that the Board's redistricting consultant, Gary Joiner, was aware that changes could be made "to consolidate some precincts and thus reduce administrative costs"); with *id.* at 86a (¶ 62) (noting that "it was also Joiner's understanding" that "costs could be reduced by placing the machines and poll workers of two precincts at one polling place").

explain the Board's abrupt decision, when faced with that plan, to abandon its search for alternatives and adopt the Police Jury plan. One of the three towns—Haughton—was wholly unaffected by either majority-black district in the NAACP plan. See Def.-Int. Exh. 7, Map 3. The Board could thus have readily drawn two majority-black districts without splitting that town had it attempted to do so.[12] Moreover, the Police Jury plan, which the Board rushed to adopt, divided well-established, predominantly black neighborhoods within Bossier City and along the boundaries of the town of Benton. J.A. 102-104. Appellee's articulated rationale of avoiding the splitting of municipalities is pretextual.

In sum, the strongest evidence demonstrating the Board's purpose is not the Board's failure to adopt the NAACP plan but rather its decision to adopt the Police Jury plan—a plan it had already rejected as inconsistent with its districting interests—in circumstances suggesting a discriminatory motivation. As Judge Kessler found below,

> [t]he common-sense understanding of these events leads to one conclusion: The Board adopted the Police Jury plan—two years before the next election—in direct response to the presentation of a plan that created majority-black districts. Faced with growing frustration of the black community at being excluded from the electoral process, the only way for the School Board to ensure that no majority-black districts would be created was to quickly adopt the Police Jury plan and put the issue to rest.

[12] The "Cooper 2" plan submitted by Defendant-Intervenors below included Haughton entirely within District 12. See Def.-Int. Exh. 25B.

J.S. App. 49a-50a. The district court's holding that appellee met its burden of proof,[13] notwithstanding this compelling evidence, was clear error.

3. We explained in our opening brief (Gov't Br. 33-44) that, when Section 2 was amended in 1982, Congress read this Court's decision in *Beer* v. *United States*, 425 U.S. 130 (1976), as requiring that electoral changes resulting in unlawful vote dilution not be precleared. In *Beer*, 425 U.S. at 141, the Court concluded that a nonretrogressive redistricting plan could not violate the "effect" prong of Section 5 "unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." In noting the possibility that "a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional," the Court cited, *inter alia*, the vote dilution cases culminating in *White* v. *Regester*, 412 U.S. 755 (1973). See *Beer*, 425 U.S. at 142-143 n.14. In the 1982 amendments, Congress reinstated what it understood to be *White*'s "results" test as the standard governing Section 2 claims. See *Gingles*, 478 U.S. at 43-44 & n.8.

Congress reasonably read the Court's decision in *Beer* to require the conclusion that changed voting systems violative of amended Section 2's "results" standard could not be precleared under Section 5—whether because a discriminatory "result" constituted a form of discrimi-

[13] A covered jurisdiction in a Section 5 declaratory judgment action has the burden of proving, *inter alia*, that its voting changes were not adopted for a discriminatory purpose. *Georgia* v. *United States*, 411 U.S. 526, 538 (1973). As a consequence, even if the evidence were in equipoise with respect to the question of discriminatory purpose, the district court would have been obligated to deny Section 5 preclearance.

natory "effect" under Section 5, or because the equitable remedy of preclearance could not be invoked in aid of a proven violation of anti-discrimination law. See Gov't Br. 34-35. The Senate Report made Congress's understanding on this point explicit by quoting *Beer*'s discussion and concluding that "[i]n light of the amendment to Section 2, it is intended that a Section 5 objection also follow if a new voting procedure itself so discriminates as to violate Section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982). The Attorney General's Procedures for the Administration of Section 5 incorporate Congress's understanding by requiring a denial of preclearance where "a bar to implementation of the change is necessary to prevent a clear violation of amended section 2." 28 C.F.R. 51.55(b)(2).[14]

The Senate Report makes clear that Congress viewed *Beer* as *already* incorporating a prohibition of unlawful vote dilution into Section 5. It is therefore simply irrelevant that, as appellee repeatedly observes (Bd. Br. 13, 14, 15, 22 & n.17), Congress did not alter the language of Section 5 itself in 1982 to provide expressly that a Section 2 "results" violation requires a denial of preclearance. Congress need not alter the language of a statutory

[14] Appellee contends (Bd. Br. 22-23 n.18) that this regulation is not entitled to deference. This Court, however, has accorded "particular deference" to the interpretations of the Voting Rights Act set forth in the Procedures for the Administration of Section 5. *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 39 (1978); see *Georgia* v. *United States*, 411 U.S. 526, 536-539 (1973); see also *Morse* v. *Republican Party of Virginia*, 116 S. Ct. 1186, 1193-1197 (1996) (plurality opinion) (applying Attorney General's regulation relating to Section 5 coverage of political parties). Nor is the regulation—which interprets Section 5's prohibition on voting changes "hav[ing] the effect of denying or abridging the right to vote on account of race," 42 U.S.C. 1973c, to encompass changes that "result" in discriminatory vote dilution—unreasonable or contrary to the plain text of the statute. See generally *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

provision when, as here, it agrees with a prior judicial gloss on that provision. To the contrary, "[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 134 (1978).[15]

Appellee incorrectly contends (Bd. Br. 20) that the *Beer* language quoted in the Senate Report "simply makes the obvious point that intentionally discriminatory action is prohibited by Section 5."[16] The *Beer* Court's discussion of a change that "itself so discriminates * * * as to violate the Constitution," *Beer*, 425 U.S. at 141, and its discussion of the ways in which a change might violate that standard, *id.* at 142-143 n.14, would have been a highly circuitous way of making the obvious point that Section 5's text prohibits changes with the "purpose" of denying or

[15] By contrast, the 1982 amendments did alter the text of the "bailout" provisions in Section 4(b) of the Act, 42 U.S.C. 1973b(b), to provide expressly that a covered jurisdiction could not exempt itself from Section 5's preclearance requirement unless it had eliminated "all voting procedures and methods of election which inhibit or dilute equal access to the electoral process." 42 U.S.C. 1973b(F)(i). This amendment was necessary because—unlike in the case of Section 5—prior interpretation of Section 4 did not allow bailout to be denied on the basis of unlawful vote dilution. S. Rep. No. 417, 97th Cong., 2d Sess. 43-45 (1982).

[16] Appellee also notes (Br. 20) that Justice Marshall, dissenting in *Beer*, vigorously argued that the *White* v. *Regester* standard should apply. But Justice Marshall—like Congress—read the majority opinion in *Beer* as ultimately holding that preclearance should be withheld where a change violates *White*'s "results" test. See *Beer*, 425 U.S. at 153-155.

abridging the right to vote.[17] Moreover, by noting that an ameliorative plan could "*continue so to discriminate* on the basis of race or color as to be unconstitutional," *id.* at 142 n.14 (emphasis added), the Court focused on the continuing *operation* of the redistricting plan, rather than on the discrete *intent* underlying its enactment. In light of that language, Congress reasonably concluded that *Beer* required that preclearance be denied where a change violated *White*'s "results" test. The Senate Report—the "authoritative source" for determining Congress's intent in enacting the 1982 amendments, *Gingles*, 478 U.S. at 43 n.7—makes clear that Congress read *Beer* in this way.

Nor would the result be different if Congress erred in interpreting the *Beer* decision; where Congress acts to codify its understanding of prevailing case law, that understanding is controlling for purposes of subsequent statutory construction. "Whether that understanding of Congress was in some ultimate sense incorrect is not what is important * * *. For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *General Services Administration*, 425 U.S. 820, 828 (1976).

Appellee invokes the "rule of statutory construction that if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." Bd. Br. 24 (quoting *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted)). The language of the Voting Rights Act, however, does make "unmistakably

[17] The question of discriminatory purpose was not at issue in *Beer* because the three-judge court had denied preclearance based solely on Section 5's "effect" prong. See *Beer*, 425 U.S. at 136 n.7.

clear" that it alters the "usual constitutional balance" by subjecting covered jurisdictions like Bossier Parish to the requirements of Section 5, and by requiring all States and political subdivisions to comply with Section 2. Because Bossier Parish is clearly subject to the restrictions of both Section 2 and Section 5, the denial of preclearance to one of its voting changes that violates Section 2 does not work any further alteration of the constitutional balance. Indeed, given the substantial overlap in the factors relevant to discriminatory purpose and the factors relevant to a Section 2 violation, much if not all of the evidence necessary to a Section 2 inquiry will necessarily be before the Section 5 court in any event. Compare *Gingles*, 478 U.S. at 43-51 (factors relevant to establishing Section 2 violation), with *Rogers*, 458 U.S. at 622-627 (factors relevant to establishing purposeful vote dilution). It would thus be quite anomalous if Congress intended to require preclearance even when a Section 2 violation is fully established in the Section 5 proceedings. See *Morse* v. *Republican Party of Virginia*, 116 S. Ct. 1186, 1201 (1996) (plurality opinion).[18]

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[18] Appellee suggests (Bd. Br. 14, 19) that a three-judge district court lacks subject matter jurisdiction to consider Section 2 issues. Even if appellee were correct that a Section 2 claim may not form the basis for jurisdiction in the three-judge court, nothing in the statute prevents the court from considering the Section 2 results standard in the course of adjudicating a Section 5 action over which it concededly has jurisdiction. Moreover, appellee is incorrect. Jurisdiction to enforce Section 2 is provided by Section 12(f) of the Voting Rights Act, 42 U.S.C. 1973j(f), which vests subject matter jurisdiction in the "district courts of the United States," without limitation. Indeed, Section 2 challenges to statewide reapportionments *must* be brought in three-judge district courts. See 28 U.S.C. 2284(a). And this Court has affirmed the assertion of jurisdiction by the three-judge District Court for the District of Columbia to issue injunctions against the implementation of unprecleared voting changes—even though the same provision of

Finally, there is no merit to appellee's contention (Bd. Br. 10-13) that this Court's decisions in *Shaw II* and *Miller* held that a violation of Section 2 does not warrant the denial of preclearance. In each of those cases, the Attorney General's Section 5 objection was based solely on a claim of discriminatory purpose. See *Shaw II*, 116 S. Ct. at 1904; *Miller*, 115 S. Ct. at 2492. While the Court expressed "doubt that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory *purpose* under § 5," *Shaw II*, 116 S. Ct. at 1905 n.6 (emphasis added), the Court has never addressed the question whether a violation of amended Section 2 provides a ground for denying preclearance under the "effect" prong of Section 5, or as a bar to a Section 5 equitable remedy. See *City of Lockhart* v. *United States*, 460 U.S. 125, 133 n.9 (1983) (declining to address that question). Nor would denying preclearance on the basis of a Section 2 violation codify the "maximization policy" that this Court condemned in *Shaw II* and *Miller*. Cf. Bd. Br. 12. Section 2, by definition, does not require maximization. See *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2660 (1994) ("Failure to maximize cannot be the measure of § 2."). Preclearance may not be denied under Section 2's "results" test unless the detailed preconditions for such a violation are established and, in the totality of the circumstances, it is shown that minority voters in the jurisdiction lack an equal opportunity to participate in the political process and to elect representatives of their choice. See 114 S. Ct. at 2654-2663.

Section 12 provides jurisdiction for such Section 5 enforcement actions, and even though *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 560 (1969), held that such actions may be brought in the district in which the change is implemented. See *Texas* v. *United States*, No. 94-1529 (D.D.C. Sept. 27, 1994) (three-judge court), summarily aff'd, 115 S. Ct. 1397 (1995).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed and the case remanded for entry of a declaratory judgment that the redistricting plan at issue here is not entitled to preclearance under Section 5. In the alternative, the judgment should be reversed and the case remanded for further proceedings to consider, under proper legal standards, the evidence concerning discriminatory purpose and the plan's compliance with Section 2.

Respectfully submitted.

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